IN THE

SUPREME COURT OF THE UNITED STATES

1976 Term

No. 76-1097

In the Matter of

GIBSON PRODUCTS OF ARIZONA, a limited partnership,

Debtor.

ARIZONA WHOLESALE SUPPLY CO.,

Petitioner - Appellee,

v.

GEORGE J. ITULE,

Respondent - Appellant,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE F. RANDOLPH
Attorney at Law
Suite 12
2920 North 7th Street
Phoenix, Arizona 85014
Attorney for APPELLEE

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the united States Court of Appeals for the Ninth Circuit is unreported, and is printed in Appendix 2 hereto, *infra*, at A-8. The judgment of the United States District Court for the District of Arizona is printed in Appendix 1 hereto, *infra*, at A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix 2, *infra*, at A-8) was entered on August 13, 1976. A timely petition for rehearing was denied on October 15, 1976. (Appendix 2, *infra*, at A-8). The jurisdiction of the Supreme Court is invoked under 28 *U.S.C.A.* § 1254(1).

QUESTIONS PRESENTED

1. Whether there is a conflict between the *Bankruptcy Act* referring to preferences and the *Uniform Commercial Code*.

2. Whether, if there is a conflict, which should prevail.

3. Whether there can be a preference if the creditor is the only member of its class.

4. When there is a conflict between two Circuit Courts of Appeals, which shall prevail.

STATUTES INVOLVED

There are two statutes involved: § 9-306(4)(d) of the *Uniform Commercial Code*. [*Arizona Revised Statutes* § 44-3127(*D*)(4).] (Appendix

3, *infra*, at A-21.)

Section 60(*a*)(1) & (2) of the *Bankruptcy Act*, 11 *U.S.C.* § 96(*a*)(1) & (2). (Appendix 4, *infra*, at A-22).

STATEMENT OF CASE

The creditor, Arizona Wholesale Supply Company, was selling T.V. sets and other items to the debtor, Gibson Products of Arizona, on credit, for which it had perfected a security interest in the debtor's inventory more than 4 months prior to the initiation of the proceedings of Chapter XI by the debtor. The debtor sold merchandise bought from other creditors, as well, and receipts from the sale of all merchandise was commingled and deposited in a common bank account. The District Court found for the creditor and permitted the creditor to retain its security interest in the commingled funds in the bank account. On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed, and held that there was a voidable preference created by the *U.C.C.* which was in conflict with the *Bankruptcy Act*, and therefore voidable by the trustee. The sole basis of the Circuit Court's opinion was that the preference was statutory, rather than consensual.

REASONS FOR GRANTING WRIT

The reversal was grounded upon the holding that the security interest, perfected under the *Uniform Commercial Code*, § 9-306(4)(*d*), which is § 44-3127(*D*)(4) of *Arizona Revised Statutes*, passed from the merchandise to the cash, to the commingled bank account, as a result of the statute rather than as the result of a prior agreement, and therefore was a preference which could be avoided by the

trustee in bankruptcy. This was the sole basis of the Circuit Court's opinion. On Petition for Rehearing the creditor argued that (1) the legal point of statutory versus consensual, was a matter of first impression, and the stand taken by the opinion was contrary to the foremost legal minds in the country who have written copiously on the issue, and (2) even if the Court's position was correct on considering the security interest to be statutory, there was no preference, because the creditor was not thereby given a greater percentage of his debt than some other creditor *of the same class*.

On this petition for certiorari, a third issue arises. The Circuit Court's opinion states regarding *Fitzpatrick* v. *Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974):

> "We reject the Seventh Circuit's reasoning . . ."

In *Rule 19 (1)* of this Court, we find the following statement regarding the issuance of the writ of certiorari:

> "The following . . . indicate the character of reasons which will be considered: . . . (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ."

We believe that because of the magnitude of the impact on the business community and the fact that two Circuits have ruled differently on this question are sufficient reasons for this Court to issue a writ of certiorari in this case.

Under the *U.C.C.*, *supra*, a security interest in the debtor's inventory passes to the cash received

when sales are made by the debtor (even though a very small amount of proceeds was actually traced to the debtor's bank account in this case). When this cash was then commingled, the security interest followed the cash into the bank account. The *Code* makes no requirement as to quantity of proof. Professor Gilmore, in his work entitled *Secured Interests In Personal Property*, at 1339 (Vol. 2) states that:

> ". . . the creditor can take the bank account even if not a penny of what is in the account came from proceeds in which the secured party had an interest."

This transfer of the lien from the specific proceeds to the commingled cash in the bank account passed by virtue of the *U.C.C.* as the passage was an automatic substitution of the security and relates back to the original perfected security interest. More than four months elapsed prior to insolvency proceedings being instituted in bankruptcy and thus no preference can be found.

Justice Hufstedler was fully aware of the great mass of scholarly material which has been written about the possible collision of the *U.C.C.* section, *supra*, and tne preference which may be avoided under the bankruptcy laws. She cited 17 text and law review articles by prominent professors, on page 1b of her opinion, and then ignored them. We ask this Court to consider them, their reasons, and the impact upon the financial community, of the decision in this case.

The *U.C.C.* has now been adopted in all 50 states and in the District of Columbia and the Virgin Islands. It governs the decisions in nearly every business transaction in the country, involving billions of dollars. As was written in 1974 *Wisconsin Law Review* 925,995:

> "The U.C.C. . . . should generally be considered as the federal law of commerce including secured transactions . . . and should be read in harmony with the Bankruptcy Act if at all possible . . . There exists no legally valid reason, absent a contrary command in the Bankruptcy Act, why the disposition of creditors' claims in bankruptcy should not also be in accord with current business practice and understanding."

The *U.C.C.*, *supra*, clearly states that a security interest in proceeds is "a continuously perfected security interest" and that the party having it has a perfected security interest "in all cash and bank accounts of the debtor if other cash proceeds have been commingled or deposited in a bank account." The creditor's interest, however, is limited to receipts of the debtor within ten days immediately prior to the bankruptcy. The opinion in this case is contradictory in that it admits that the creditor's priority "relates back to its initial perfection" more than four months prior to institution of insolvency proceedings in the Bankruptcy Court and then find a preference within the four month period!

In 53 *Northwestern Univ. Law Review* 411, the author states:

> "Conceivably the security interest in proceeds might be attacked as a preferential transfer . . . But if the proceeds are considered as merely substituted collateral, as they should be, that argument would seem to have little merit. In any event,

> it was never advanced in bankruptcy proceedings under section 10 of the Trust Receipts Act, and the drafters of the Code have provided that the security interest is 'continuously perfected' . . . Therefore the four-month period . . . begins with the date of the secured party's obtaining the security interest in the original collateral and not with the date of his obtaining control of the proceeds."

See, in this regard, *In re Harpeth Motors*, 135 F. Supp. 863.

In 67 *Commercial Law Journal* 113 at 121, we find the author arguing that the lien is not a perference because:

> "It is an incident of the consensual security arrangement . . . The fact that the scope and operative effect of a security arrangement are regulated in quite material particulars by statute does not convert the arrangment into a statutory lien for the purpose of applying [the section of the Act on preferences]."

In accord is 4*A Collier on Bankruptcy*, at 709.

Professor Henson, writing in 65 *Columbia Law Review* 232,253, makes the following observations of the practical results of destroying the security interest:

> "Those who are prudent enough to take security are reduced to the level of those who did not, so that the ever-rising costs of administration tend to make distribution to creditors approach zero. It would in fact, on the average, make almost no difference to unsecured creditors if all secured transactions were set aside in bankruptcy, but it would make considerable difference to the secured parties involved. Is it 'equity' to frustrate the legitimate agreements of the parties to a secured transaction?
>
> In the field of secured transactions . . . a Brandeis brief based on the economic facts will . . . demonstrate, in the absence of direct authority to the contrary, why the provisions of Sect. 9-306(4) are entitled to recognition in bankruptcy. The danger here, of course, is that a court which is uninformed of the consequences of the decision might make another mistake . . .
>
> Secured transactions . . . are authorized by the language of statutes and embodied in contracts expressed in words. To be meaningful, this language must correspond to the fact structure of our world. Through centuries of change we have progressed from the rude pledge to the sophisti-

cated concepts of the U.C.C. These changes have occurred because existing patterns of financing were found to be inadequate to meet the needs of their time. These needs are not the needs of the legal profession, but rather the needs of a public that is determined to borrow money and often cannot do so without giving presumably valid security . . .

There was a need for a Uniform Commercial Code. The Code was laboriously prepared . . . Honest transactions properly entered into in good faith, deserve the fullest recognition, in insolvency and out. When the proper language is used to effectuate a legitimate secured transaction, its enforcement should not be open to question."

We feel, therefore, that we have made our first point, namely, that the *U.C.C.* is the law of the land; that, viewed properly, it does not conflict with the *Bankruptcy Act*, that the best legal writers in the country are able to reconcile the two acts, and that as an economic factor, it will cause havoc in business financing.

We pass to our second point. The definition of a preference, in bankruptcy law includes the requirement that the preferred creditor fare better than another creditor of the same class. *But the record in this case reveals no other secured creditor*. There could hardly be one where the debtor's whole inventory was floor-planned, as here. Since all of the other creditors must then be un-

secured creditors, they are of another class. If there is but one secured creditor, a transfer to him cannot create a preference, since there would be no other creditor in the same class.

Consider *In re Belknap*, 129 F. 646 (1904). There the only secured creditor was the landlord who distrained for rent past due. His lien for rent was statutory, and was challenged as a preference. The Court held:

> "The effect of the distress did not enable the landlord to obtain a greater percentage of his debt than any other creditor of the same class. There is no other creditor of the same class, as there is but a single landlord; as the claim for rent had priority over the claims of general creditors, the distress did not enable the landlord to obtain a greater percentage of his debt."

This is an old case, but has been frequently cited. See *Bickel v. Polaris Investment Co.*, 155 F. Supp. 411, 414 (1957); *In re Hoopert*, 58 F.2d 349 (1931).

CONCLUSION

In concluding, we again call this Court's attention to the fact that it should consider the impact of this decision on the world of business and finance; that it should give heed to the scholars who anticipated that a court would someday have to decide whether there was a conflict between the *U.C.C.* and the *Bankruptcy Act*, and indicated that the security interest should not be considered a

preference; that the Ninth Circuit has now gone on record as disagreeing with the Seventh Circuit, so that under *Rule 19* of this Court, a writ of certiorari should issue to make the law of the land uniform; that every state in the union has now adopted the *U.C.C.* so that it ought to be given equal consideration with the *Bankruptcy Act* if there is truly a collision between the two laws; and that what has happened in the instant case lacks the last element of a preference, another member of the same class of secured creditor who got less because the creditor here got more. Without other secured creditors, there can be no preference obtained by the one existing creditor.

Respectfully submitted,

GEORGE F. RANDOLPH
Attorney at Law
Suite 12
2920 North 7th Street
Phoenix, Arizona 85014
Attorney for APPELLEE

[APPENDIX FOLLOWS]

Certificate of Service

I, GEORGE F. RANDOLPH, do hereby certify that on this the 11th day of January, 1977, three (3) copies of the Petition for Writ of Certiorari, in final printed form, were mailed, postage prepaid, to LAWRENCE OLLASON, 182 North Court Avenue, Tucson, Arizona 85701, Counsel for the Respondent -Appellant. I further certify that all parties required to be served have been served.

GEORGE F. RANDOLPH
Attorney at Law
Suite 12
2920 North 7th Street
Phoenix, Arizona 85014
Attorney for APPELLEE

Appendix Index

Appendix 1

FILED
Jan 10 1974
Hugh M. Caldwell
Referee in Bankruptcy
United States District Court
For The District of Arizona

FILED
Jan 9, 1974
Clerk, U.S. District
Court District of Arizona

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of	)	
	)	
GIBSON PRODUCTS CO. OF ARIZONA, a limited Partnership,	)	No. B-72-32-TUC
	)	OPINION AND ORDER
Bankrupt.	)	

George J. Itule, receiver for the bankrupt, Gibson Products of Arizona, petitions to review findings of fact, conclusions of law and the order of the Honorable Hugh M. Caldwell, Referee in Bankruptcy, filed on February 1, 1973.

The debtor initiated proceedings under Title 11, Chapter XI, U.S.C., on January 13, 1972. After all offsets and credits, it was determined that Gibson Products owed Arizona Wholesale Supply Co., a secured creditor, $28,867.05 for merchandise supplied to the debtor prior to that date.

On January 12, 1972, Arizona Wholesale caused a Writ of Garnishment to be served upon the Broadway and Wilmot branch of the First National Bank of Arizona, where the debtor kept a bank account. By reason of said Writ of Garnishment, the bank held $21,848.31 of monies belonging to the debtor and on February 11, 1972, paid $44,873.63 to the receiver herein. The sum paid to the receiver included the amount held for Arizona Wholesale and constituted the total amount of the debtor's funds on hand prior to the institution of the Chapter XI proceedings.

The receiver, in his petition for review alleges the following: 1) the referee erred in Finding No. 6 in that there was no evidence that the debtor received $19,505.27 during the ten-day period immediately prior to the institution of the proceedings; 2) the referee erred in Conclusion of Law No. 3 in that there was no evidence whatsoever that the debtor commingled any monies within ten days before the institution of the proceedings; and 3) the referee erred in ordering the receiver, George J. Itule to pay petitioner the sum of $19,505.27 by reason of commingling of cash proceeds from the sale of merchandise.

The scope of review which this Court affords to orders of a referee in bankruptcy is governed by General Orders in Bankruptcy. Orders 36, 37, 47, Title 11, U.S.C., following Section 53. These orders, as implemented by Rules 52(a) and 53(e) of the Federal Rules of Civil Procedure, require this Court to accept the referee's findings unless clearly erroneous. Humphrey v. Hart, 157 F.2d 844, (9th Cir. 1946); Lines v. Bank of California, 467 F.2d 1274 (9th Cir. 1972); In Re United Wholesalers, 274 F.2d 316 (7th Cir. 1960).

There is no question that Arizona Wholesale has a perfected security interest in proceeds. In addition, the referee concluded that A.R.S., Section 44-3127(D) is controlling in the present case; said Section reads as follows:

> "In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest:
>
> . . . . . .
>
> 4. In all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph 4 is: (a) Subject to any right of set-off; and (b) Limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period."

The receiver alleges that there is no evidence that Gibson Products received $19,505.27 within the ten-day period referred to in the above statute. The Court disagrees. There is substantial evidence to support the referee's finding.

At the hearing, on October 3, 1972, the receiver testified that Exhibit No. 8 was an exact copy of the first page of the book which contained Gibson's daily sales records. He testified that the

first page covered sales from January 3rd of 1972 through January 31st, and that it reflected the cash received during January of 1972. Upon being shown Exhibit No. 6, Mr. Itule totaled the amount of cash received

by Gibson ten days prior to the filing of bankruptcy. The amount received between January 3rd and January 12th totaled $19,505.27. (Tr. 12-13).

At the hearing on December 5, 1972, Mr. Itule testified that he had brought to the hearing the records of cash receipts received by Gibson during the ten days immediately prior to January 13, 1972. The sales book reflected receipts from the 3rd through the 12th of January in the amount of $19,505.27. (Tr. 28).

The receiver, in his petition for review, attacks the referee's Conclusion of Law No. 3. He alleges that there was no evidence that the debtor commingled monies within ten days before the institution of the bankruptcy proceedings. However, it appears the receiver has erred in seeking review of Conclusion of Law No. 3. The referee specifically states that because of the commingling of funds which was the basis for Finding of Fact No. 5, Arizona Wholesale, under A.R.S., Section 44-3127(d)(4)(b) is entitled to $19,505.27. It is obvious that the receiver is actually seeking review of Finding of Fact No. 5. The Court will, therefore, address itself to this Finding, which reads as follows:

> "Debtor commingled cash proceeds from the sale of merchandise which had been supplied to it by petitioner with other cash proceeds from the

> sale of merchandise supplied to it from other suppliers."

Again, the referee's finding is supported by substantial evidence.

William Hodgson testified at the December 5, 1972, hearing that all of the General Electric television sets sold by Gibson Products were sold by him as sales representative of Arizona Wholesale Supply Co. He stated that Gibson could not have obtained the television sets anywhere else because Arizona Wholesale had exclusive rights for the territory of Arizona. (Tr. 12-17).

Mr. Ray Ivey, manager of the hardware and automotive departments in Gibson's testified at the same hearing that sometime in November of 1972, the management moved the television department next to the hardware and automotive departments. A common cashier's counter was

used by the three departments. Mr. Ivey stated that General Electric television sets were sold within the ten days prior to the 13th of January. (Tr. 33, 39-40). Mr. Ivey could not state whether a television set was sold on a particular day in January, and the store kept no record as to specific items sold each day. The only record kept by the store was of the gross amount of sales on a certain day. (Tr. 37).

The television sets sold were paid for either at the hardware cashier's counter or at the front cashier's counter. When the sets were paid for at the hardware counter, the proceeds from each sale were commingled in the cash register with the proceeds from the sale of hardware. (Tr. 40).

When Mr. Ivey was asked how the cash was handled after it was put in the cash register, he replied:

> "It was picked up by the manager or the assistant manager at the close of the business that evening. He, in turn, put it in the safe in the building. It was then, I assume-which I have seen them do many a time-deposited in the local bank." (Tr. 41).

During the hearing, an employee of the Broadway and Wilmot branch of the First National Bank of Arizona established the fact that all funds belonging to Gibson were kept in an account in that branch. (Tr. 52-57).

Carol Frey testified that Exhibit No. 7 is a Proctor-Silex hair dryer which she purchased from Gibson's during the first week of January, 1972. Exhibit No. 6 shows that there were no sales the first two days of January, so that the sale of the hair dryer had to be within the ten-day period immediately prior to the filing of bankruptcy. Mrs. Frey stated that she had broken her other hair dryer during the holidays but waited until her children were in school to purchase this one. (Tr. 45). The price was $9.99, plus tax. She paid with a $20.00 bill. The cashier made change from the cash register while being observed by Mrs. Frey. (Tr. 46).

Exhibit No. 1 shows that Gibson purchased Proctor-Silex hair dryers from Arizona Wholesale. Mr. Hodgson testified that Proctor-Silex

hair dryers, model numbers 86101A and 86102A, were in Gibson's stock (Tr. 10); Exhibit No. 4, an inventory of the stock, confirms this fact.

The findings of the referee here are not clearly erroneous and must be sustained. The Court should not lightly disturb a referee's determination of fact and it is only when there is no evidence whatever to sustain his findings that a reversal is justified. In Re Savarese, 56 F. Supp. 927 (E.D. N.Y. 1944).

The evidence and referee's findings therefrom amply support the conclusion that cash proceeds were commingled and that $19,505.27 was received by Gibson within ten days of the proceedings. It follows that the Order of the referee must be upheld; therefore,

IT IS ORDERED that the Order of the referee ordering George J. Itule to pay to petitioner the sum of $19,505.27, is affirmed.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Opinion and Order to the Referee in Bankruptcy and to all counsel of record.

DATED this 9th day of January, 1974.

/s/ William C. Frey
William C. Frey
United States District
Judge

Appendix 2

FILED
Aug 13 1976
Emil E. Melfi, Jr.
Clerk, U.S. Court of
Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of GIBSON PRODUCTS OF ARIZONA, a limited partnership, Debtor.	)	No. 74-1675
ARIZONA WHOLESALE SUPPLY CO., Petitioner-Appellee, v. GEORGE J. ITULE, Respondent-Appellant.	)	OPINION

Appeal from the United States District Court
for the District of Arizona

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and WHELAN,* District Judge.

HUFSTEDLER, Circuit Judge:

On this appeal we must referee a collision between the "proceeds" provision of the Uniform Commercial Code (U.C.C. § 9-306(4), A.R.S. § 44-3127(D)[1/]) and the bankruptcy trustee's power to avoid preferences under Section 60 of the Bankruptcy act.[2/] The provisions collide under

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1/ For convenience, we refer hereafter solely to U.C.C. § 9-306, rather than to the Arizona statute adopting the U.C.C. We also use the text of U.C.C. § 9-306 prior to the 1972 amendments because Arizona did not adopt the 1972 amendments until 1975, effective January 1, 1976, a date long after this litigation began. (Arizona Laws

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* Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

1/ (continued):

of 1975, Ch. 65.) The 1972 Amendments, even if applicable, do not affect the issues in this case.

In pertinent part, U.C.C. § 9-306 provided:

"(1) 'Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract

right. Money, checks and the like are 'cash proceeds'. All other proceeds are 'non-cash proceeds'.

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covering the original collateral also covers proceeds; or

(b) the security interest in the proceeds is perfected before the expiration of the ten day period.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) in identifiable non-cash proceeds;

(b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected

security interest under this paragraph (d) is

(i) subject to any right of set-off; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period."

2/ The impending collision between U.C.C. § 9-306(4)(d) and Bankruptcy Act § 60, 11 U.S.C. § 96, has been the subject of much scholarly debate:

2/ (continued):

4A Collier on Bankruptcy, ¶ 70.62A [4.3] (14th ed. J. Moore & J. King 1976); 2 G. Gilmore, Secured Interests in Personal Property, § 45.9 (1965); Coogan & Vagts, "The Secured Creditor and the Bankruptcy Act: An Introduction," in 1 P. Coogan, W. Hogan & D. Vagts, Secured Transactions under the Uniform Commercial Code § 9.03[3][b][iii] (1968); Countryman, "Code Security Interests in Bankruptcy," 4 U.C.C.L. Journal 35, 40-49 (1971); Duesenberg, "Lien or Priority under Section 10, Uniform Trust Receipts Act," 2 Bost. College Ind. & Com. L. Rev. 73 (1960); Epstein, "'Proceeding' under the Uniform Commercial

Code," 30 Ohio State L.J. 787, 796-808 (1969); Gillombardo, "The Treatment of Uniform Commercial Code Proceeds in Bankruptcy: A Proposed Redraft of Section 9-306," 38 U. Cinc. L. Rev. 1, 7-13, 22-30 (1969); Hawkland, "The Proposed Amendments to Article 9 of the U.C.C., Part II Proceeds," 77 Com. L.J. 12, 18-19 (1972); Henson, "'Proceeds' Under the Uniform Commercial Code," 65 Colum. L. Rev. 232, 242-53 (1965); Kennedy, "The Impact of the Uniform Commercial Code on Insolvency: Article 9," 67 Com. L.J. 113, 116-17 (1962); Kennedy, "Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9," in 1 P. Coogan, W. Hogan & D. Vagts, supra, § 10.03[3] (1968); Levy, "Effect of the Uniform Commercial Code Upon Bankruptcy Law and Procedure," 60 Com. L.J. 9, 11-12 (1955); Marsh, "Triumph or Tragedy?: The Bankruptcy Act Amendments of 1966," 42 Wash. L. Rev. 681, 715-17 (1967); Comment, "The Commercial Code and the Bankruptcy Act: Potential Conflicts," 54 N.W.U.L.R. 411, 420-24 (1958); Comment, "Toward Commercial Reasonableness: An Examination of Some of the Conflicts Between Article 9 of the Uniform Commercial Code and the Bankruptcy Act," 19 Syr. L. Rev. 939, 954-55 (1968); Marsh, "Book Review," 13 U.C.L.A.L. Rev. 898, 907-09 (1966).

circumstances that place the creditor, asserting a perfected security interest in the debtor's bank account, in the dimmest equitable light: If the creditor prevails, it receives $19,505.27 from the debtor's account on proof that the debtor, within ten days of the insolvency, deposited $10 in the account from the sale of a hair dryer in which the

creditor had a perfected security interest. The district court affirmed the bankruptcy judge's order awarding $19,505.27 to the secured creditor. We reverse because we conclude that the operation of U.C.C. Section 9-306(4)(d) created a voidable preference by the transfer to the creditor of a perfected security interest in the cash deposited in the debtor's account that exceeded the amount of the creditor's proceeds.

The creditor, Arizona Wholesale Supply Co. ("Wholesale") sold General Electric and Proctor-Silex appliances to the debtor, Gibson Products of Arizona ("Gibson"). Wholesale has a perfected security interest in the appliances. On January 13, 1972, Gibson initiated Chapter XI proceedings. During the ten-day period immediately preceding the institution of these proceedings, Gibson deposited $19,505.27 in its bank account. During the same period, Gibson deposited in the account $10 from the sale of a Proctor-Silex dryer.[3/] At the time insolvency proceedings were instituted, Gibson was indebted to Wholesale in the amount of $28,800 for the appliances it had sold to Gibson and for which it has perfected security interests.

Before we turn to the interesting problem created by the interplay of U.C.C. Section 9-306(4)(d), we net one red

---

3/ Wholesale tried, but failed to prove that the proceeds from the sale of some television sets were also deposited in the account during the ten-day period.

herring. Wholesale claimed an interest in Gibson's bank account based on the garnishment it levied on

the account on January 12, 1972, pursuant to which the bank temporarily sequestered $21,848.31. The bank later paid over that sum, as well as the remainder of the account, to the receiver. The garnishment did nothing for Wholesale because its garnishment lien was voidable under Section 67a of the Bankruptcy Act, and the trustee voided it. (4 Collier on Bankruptcy, ¶ 67.10, at 130-36 (14th ed. J. Moore & J. King 1976).)

The proceeds section of the Code generally follows the pre-Code law that a security interest continues in any identifiable proceeds received by the debtor from the sale or other disposition of the collateral. The Code's new twist is extending the creditor's security interest to commingled funds without specifically tracing the creditor's proceeds into the fund, when the debtor has become insolvent. (U.C.C. § 9-306(4)(d).) No collision between the proceeds provision of the Code and the preference sections of the Bankruptcy Act occurs when the creditor's perfected security interest in his collateral is attached to the proceeds from the sale or other disposition of the collateral if (1) his interest was initially perfected in the collateral more than four months before bankruptcy, and (2) he can identify the proceeds to which his security interest has attached. Under these circumstances, the creditor has priority over later creditors when he first perfected his security interest, and his priority relates back to his initial perfection. (Cf. DuBay v. Williams (9th Cir. 1969) 417 F.2d 1277, 1286-87.) The problem arises in the U.C.C. Section 9-306(4)(d) situation because that subsection gives the secured creditor a perfected security interest in the

entire amount deposited by the debtor within ten

days before bankrupcy (sic) without limiting the interest to the amount that can be identified as the proceeds from the sale of the creditor's collateral. With respect to the funds that are not the creditor's proceeds, the creditor has no security interest except that conferred by U.C.C. Section 9-306(4)(d). His interest in these nonproceeds arises upon the occurence of two events: (1) insolvency proceedings instituted by or against a debtor, and (2) commingling of some of the proceeds from his collateral with the debtor's cash on hand or with other deposits in his debtor's bank account. His security interest is limited to an "amount not greater than the amount of any cash proceeds received by the debtor within ten days before institution of the insolvency proceedings" and is subject to the additional set-offs in Section 9-306(4)(d).

The draftsmen's intent was not to deliver a security bonanza to any secured creditor. As Professor Gilmore observes: "It goes without saying that a provision of state law which purported to give a secured creditor greater rights in the event his debtor's estate was administered in bankruptcy than he would have apart from bankruptcy would be invalid. However, . . . §9-306(4) does not in the least aim at such a result. Indeed, §9-306(4) is the reverse of such a statute, since it sharply cuts back the secured party's rights when insolvency proceedings are initiated." (2 G. Gilmore, Security Interests in Personal Property ¶ 45.9, at 1337-38 (1965).) The intent was to eliminate the expense and nuisance of tracing when funds are commingled and to limit the grasp of secured creditors to the amount received during the last ten days before insolvency proceedings, which, the draftsmen assumed, would usually

less than the same creditor could trace if he had a grip on the entire balance deposited over an unlimited time. (Id. at 1340.) On that assumption, awarding a perfected security interest to the secured creditor, good for a short time on the entire balance, gives the secured creditor no windfall to the detriment of general creditors. On our facts, the contrary is true.

When confronted with an analogous situation, the Seventh Circuit limited the secured creditor's interest to those proceeds in the bank account traceable to the sale of the creditor's collateral. The Seventh Circuit's theory was that the term "any cash proceeds" used in Section 9-306(4)(d) does not refer to all receipts from any source deposited in the bank account, but, instead, refers to "proceeds" as defined in Section 9-306(1), and thus the phrase means "cash proceeds from the sale of collateral in which the creditor had a security interest." (Fitzpatrick v. Philco Finance Corp. (7th Cir. 1974) 491 F.2d 1288, 1291-92.)

Although we reach a similar result, we reject the Seventh Circuit's reasoning because, in our view, that construction impermissibly bends the language and structure of Section 9-306. The general definition of "proceeds" in Section 9-306(1) cannot be transplanted into Section 9-306(4) shorn of its statutory freight. The statute divides "proceeds" into two categories, "identifiable" and "commingled," i.e., nonidentifiable proceeds, and alters the reach of a perfected security interest, depending upon whether the proceeds are identifiable or nonidentifiable. (Compare § 9-306(4)(a), (b), (c) with § 9-306(4)(d).) Section 9-306(4)(d) deals only with nonidentifiable cash proceeds. If the cash proceeds could be "identified," i.e.,

had not been commingled, the secured party would have a perfected security interest in the whole fund under Section 9-306(4)(b), just as he did in pre-Code days, without any of the limitations imposed by Section 9-306(4)(d). Under the Code scheme, the secured creditor also has a perfected security interest under subsection (d) when he cannot identify his proceeds in the commingled fund, as long as he can show that some of his proceeds were among those in the commingled fund. (See Section 9-306, Comment in U.C.C. Rep. Serv., Current Materials, ¶ 9306, at 60 (1968); Gilmore, supra, § 45.9, at 1336-37.)

We leave the language of Section 9-306(4) as it was drafted and apply Section 60 of the Bankruptcy Act to resolve the problem. As defined by Section 60a(1), a preference is "[1] a transfer . . . of any property of a debtor [2] to or for the benefit of a creditor [3] for or on account of an antecedent debt, [4] made or suffered by such debtor while insolvent and [5] within four months before the filing . . . [of bankruptcy], [6] the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class." Section 60a(2) of the Bankruptcy Act provides that "a transfer of property . . . shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." As we held in DuBay v. Williams, supra, 417 F.2d at 1287:

> "'Transfer' for the purpose of section 60a(2) is thus equated with the act by which priority over later creditors is achieved and not with the event which attaches the security interest to a specific account."

With respect to Wholesale's security interest in the proceeds from the sale of the collateral, no later creditor could obtain priority over Wholesale from the time its financing statement was filed and further perfected pursuant to Section 9-306(3), at least until Wholesale's proceeds were commingled with that of other secured creditors or with cash from other sources deposited in Gibson's bank account. Wholesale's security interest in those proceeds relates back to its initial financing statement. (Cf. DuBay v. Williams, supra, 417 F.2d at 1287-88.) However, Wholesale had no interest in cash other than its own proceeds, and hence no priority over later creditors in such cash, until (1) some part of Wholesale's proceeds were deposited with other cash in Gibson's bank account, (2) within ten days of Gibson's filing its Chapter XI petition. The effect of Section 9-306(4) is thus to transfer to Wholesale a security interest in the cash in Gibson's bank account which does not derive from the sale of its collateral. In this situation, the act that gives Wholesale priority and the events that attach the security interest to the questioned asset occur at the same time. The transfer cannot occur earlier than ten days before the institution of bankruptcy. The transfer of the excess, above the wholesaler's proceeds, is a preference unless we can say that the transfer was neither for nor on account of an antecedent debt. We cannot avoid the conclusion that the transfer was on account of an antecedent debt. Wholesale could not qualify for Section 9-306(4) treatment absent the antecedent debt; moreover, the transfer does not happen unless the debt owed exceeds the payments made to the creditor during the ten-day period before the bankruptcy petition has been filed.

The result is that Wholesale cannot successfully assert its claim under U.C.C. Section 9-306(4)(d) to thwart the trustee's power to set that interest aside as a preference. However, the conclusion does not necessarily also follow that the creditor loses his security interest both in the proceeds from the sale of his collateral and in the non-proceeds in the debtor's bank account. In his contest with the trustee, he only loses his claim to the amounts in excess of his proceeds because only that amount is a preference. His security interest in the whole account, subject to the limitations of U.C.C. Section 9-306(4), is valid except that the trustee can avoid it. To the extent that a creditor is able to identify his proceeds to trace their path into the commingled funds, he will be able to defeat pro tanto the trustee's assertion of a preference.

By this construction of Section 60 of the Bankruptcy Act and Section 9-306(4) of the U.C.C., we do violence neither to statute nor to substantial justice among the parties. The creditor's security interest in the whole account under Section 9-306(4) is prima facie valid, except as to the trustee, and, as to him, the creditor's security interest is presumptively preferential. The creditor can rebut the presumption by appropriately tracing his proceeds. We think that it is fair to place the burden on the creditor to identify his own proceeds and thus to defeat, in whole or in part, the trustee's claim of preference. The creditor is in a better position than the trustee to trace his proceeds; moreover, if the creditor wants to avoid both the limitations of U.C.C. Section 9-306(4)(d) and the burden of proof in a potential contest with the trustee, all he needs to do is to prevent commingling of his proceeds and thus to follow U.C.C. Section

9-306(4) (a)-(c).

Reversed and remanded for further proceedings consistent with the views herein expressed.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) in identifiable non-cash proceeds;

(b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is

(i) subject to any right of set-off; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period.

Appendix 4

MODERN BANKRUPTCY MANUAL

§ 60. [11 USC § 96] Preferred creditors.

(a) (1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivision (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of the petition.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NUMBER 76-1097

In the Matter of)
)
GIBSON PRODUCTS OF ARIZONA,)
a limited partnership,)
)
Debtor.)
)
ARIZONA WHOLESALE SUPPLY)
CO.,)
)
Petitioner - Appellee,)
)
vs.)
)
GEORGE J. ITULE,)
)
Respondent - Appellant.)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE OLLASON
182 North Court Avenue
Tucson, Arizona 85701

ATTORNEY FOR APPELLANT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NUMBER 76-1097

In the Matter of GIBSON PRODUCTS OF ARIZONA, a limited partnership, Debtor.	)
ARIZONA WHOLESALE SUPPLY CO., Petitioner - Appellee, vs. GEORGE J. ITULE, Respondent - Appellant.	)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CASES

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PAGE

CODE

Uniform Commercial Code

OTHER AUTHORITIES

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears at 543 F.2d 652.

QUESTION PRESENTED

1. Whether the security interest in non-identifiable proceeds recognized by Arizona Revised Statutes Section 44-3127(D) (4) (Uniform Commercial Code Section 9-306(4) (d)) is avoidable by a trustee under the provisions of the Bankruptcy Act.

STATEMENT OF THE CASE

Petitioner Arizona Wholesale Supply Co. (hereinafter "Wholesale") sold various appliances to Gibson Products of Arizona (hereinafter "Gibson") and retained a security interest in the appliances to secure the purchase price, which security interest was perfected more than four months prior to the initiation of insolvency proceedings against Gibson. Receipts from the sale of the Wholesale appliances were commingled with funds from other sources by Gibson. The United States District Court for the District of Arizona found that Wholesale had a valid security interest covering all of Gibson's cash receipts during the ten days prior to institution of insolvency proceedings. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the security interest recognized by the District Court constituted a voidable preference to the extent that the cash receipts in question were not traceable from the appliances in which Wholesale had a security interest.

ARGUMENT

Petitioner presents several arguments in support of the grant of certiorari in this case, but the points raised in the Petition which bear directly upon the provisions set forth in and suggeted by the Supreme Court Rule 19 are essentially two: that there is a conflict between the Circuits on a point of Federal Law, and that the issue decided by the Ninth Circuit is such a source of turmoil in the business community that this Court should put the issue at rest. Nevertheless this brief will treat each of the agruments raised in the Petition.

The conflict alleged by Wholesale arises from the reference in the opinion by the Court of Appeals herein to the case of Fitzpatrick v. Philco Finance Corp., 491 F.2d 1288 (7th Cir. 1974).

But in quoting the language in the opinion rejecting the reasoning adopted by the Seventh Circuit the Petitioner has omitted the qualifying phrase found at page 5 of the Opinion (page A-16 of Petition: "Although we reach a similar result . . . ." The phrase is important because it points out the fact that while the two Circuits applied different reasoning in the respective cases, they reached results which were essentially the same. In Fitzpatrick the Seventh Circuit decided that the phrase "any cash proceeds" found in U.C.C. § 9-306 (4)(d)(ii) net "proceeds derived from and traceable to the original collateral." The result was that the creditor could recover funds under the Code provision only to the extent that such funds could be identified as arising from the sale of his collateral. In the instant case that the phrase "any

cash proceeds" means "any cash proceeds from any source," but to the extent that such proceeds are not shown to be derived from the sale of the original collateral, the security interest therein is avoidable by the trustee under Section 60 of the Bankruptcy Act. Thus the only difference between the two cases is that the Seventh Circuit would hold that no security interest arises in non-identifiable proceeds under the particular circumstances set forth in the Code section in question, and the Ninth Circuit would hold that such an interest does arise but can be avoided by the trustee.

Before a purported conflict between the Circuits should give rise to the granting of certiorari on the point in conflict, there should be a "real and embarrassing conflict of opinion and authority" between the Courts of Appeals. N.L.R.B. v. Pittsburg S. S. Co., 340 U.S.

498, 71 S.Ct. 453, 95 L.Ed. 479 (1951). Respondent submits that the decisions of the respective Circuits in this case are essentially harmonious.

Petitioner further asserts that wealth of scholarly discussion on the question presented here supports the granting of certiorari. But unless such discussion reflects a matter of significant public concern, certiorari is not warranted, as this Court does not sit to resolve issues of scholarly debate. See Rice v. Sioux City Mem. Park Cemetary, Inc., 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Although the debate in the Law Reviews over the interpretation of U.C.C. § 9-306(4)(d) has been going on for over twenty years, there are only two opinions from the Courts on the subject - and those essentially in accord - indicating that the issue of rather less pressing than the debate would lead one

to believe.

Moreover, the preponderance of scholarly authority is conctrary to Petitioner's position herein. The majority of the writers who have treated the subject have concluded, for one reason or another, that the provisions of U.C.C. § 9-306(4)(d) are voidable, at least as to non-identifiable proceeds. E.g., 4A Collier on Bankruptcy, ¶ 70.62 A [illegible] (14th Ed. J. Moore & J. King 1976); Levy "Effect of the Uniform Commercial Code Upon Bankruptcy Law and Procedure," 60 Com. L.J. 9, 11-12 (1955); Kennedy, "The impact of the Uniform Commercial Code on Insolvency: Article 9, "67 Com. L.J., 113, 116-17 (1962); Marsh, "Triumph or Tragedy?: the Bankruptcy Act Amendments of 1966, 42 Wash. L.Rev. 681, 715-17 (1967); Marsh, "Book Review," 13 U.C.L.A. L.Rev. 898, 907-09 (1966); Comment, "The Commercial Code and the Bankruptcy Act:

Potential Conflicts," 54 N.W.U.L.R. 411, 420-24 (1958). Thus Judge Hufstedler did not ignore the authority set forth in the footnote to the opinion below; the opinion was in accord with the bulk of scholarly opinion.

Petitioner's next point, is that the U.C.C. is in substantially the same form, the law in all of the states. But as the quotation at p. 6 of Petitioner's Brief explicitly recognizes, a contrary provision of the Bankruptcy Act will be presumed to supercede the U.C.C.

Petitioner next proceeds to the contention that the opinion below was erroneous as well as inconsistent in finding the existence of a preference in this case, inasmuch as a relation back to the initial perfection of the security interest is conceded. The provision in U.C.C. § 9-306 (3) that a security interest in proceeds is "continuously

perfected" is inapposite to a security interest under subparagraph (4) (d), which refers to a security interest not in proceeds, but in "all cash and bank accounts of the debtor". And in referring to the circumstances under which a creditor's priority relates back to the initial perfection, at page 2 of the Ninth Circuit Opinion (page A-14 of Petition) the Court makes it clear that it is referring to identifiable proceeds, and not to those treated by subparagraph (4) (d) of the provision in question. The quotation from footnote 54 to Comment, 54 N.W. U.L.Rev. 411, 421-22 (1958) is similarly inapposite in that it refers to proceeds in general, and not to non-identifiable proceeds. In fact, the author of the comment reaches a conclusion favorable to the position taken by Respondent herein in that tracing of proceeds under subparagraph (4)(d) is

favored by the opinion of the Ninth Circuit. Id. at 423-24.

In re Harpeth Motors, 135 F.Supp. 863 (M.D. Tenn. 1955), relied upon by Petitioner in support of its position, was a case where a security interest arose from a demand for delivery of proceeds independent of any insolvency proceeding under § 10(b) of the Uniform Trust Receipts Act, and as such is clearly distinguishable in the case at bar. Further, the Harpeth decision has been soundly criticized as to its validity. E.g., In re Crosstown Motors, Inc., 272 F.2d 224 (7th Cir. 1959); cert. denied, 363 U.S. 811, 80 S.Ct. 1246, 4 L.Ed.2d 1152 (1960).

The quotation from Kennedy, "The Impact of the Uniform Commercial Code on Insolvency," Article 9, 67 Comm. L.J. 113 at 121 (1962) appearing at page 7 of the Petition is both taken out of con-

text and misconstrued. In the first place, the quotation is referring to identifiable proceeds, which are not at issue here. In the second place, the quotation is directed to § 67 (c) of the Bankruptcy Act, dealing with liens, and not with § 60, which is concerned with preferred creditors. Pages 116-17 of the article demonstrate that the author is squarely opposed to Petitioner's position when it comes to unidentifiable proceeds.

It is also misleading to suggest that Petitioner's position is supported by Collier on Bankruptcy:

> "There is a definite problem, however, as to the validity of a security interest in the unidentifiable proceeds under Sections 60 and 67 (c) . . . if the security interest does not arise until

> the advent of insolvency proceedings, what is to prevent it from being declared a voidable preference under § 60 . . . (Sections 67 (c) and 70 may also invalidate the transfer) . . . . In any event, the security interest in proceeds under § 9-306 (4) of the U.C.C., where they are unidentified, may very likely be invalidated by a trustee who has an arsenal of weapons at his disposal for this very purpose." Collier on Bankruptcy, supra, at 710.

Petitioner's lengthy quotation from Mr. Henson's article at pp. 7-9 of the Petition again misses the point. Mr. Henson's lament is directed at the feared invalidation of security interests in

proceeds in general; that author reaches his conclusions as to the validity of paragraph (4) of § 9-306 without any analysis of the particular problems which arise with the commingling of funds and the springing into being at the time of insolvency of a right in collateral to which no right had previously attached.

Petitioner's final argument challenges the finding of a preference by the Court below that a preference was present under the facts of the instant case in that Section 60 of the Bankruptcy Act provides that no preference exists unless a creditor is enabled thereby to obtain a greater percentage of his debt than another creditor of the same class. The essence of the argument is that secured creditors and unsecured creditors fall into different classes for the purposes of Section 60.

But it is well established that the classes referred to by Section 60 are those set forth in Section 64 of the Bankruptcy Act, namely: tax creditors, creditors for wages, creditors entitled by law to priority, and general creditors. In re Star Spring Bed Co., 257 F. 176 (D.N.J. 1919), aff'd 265 F. 133 (3d Cir. 1920); Jentzer v. Viscose Co., 13 F. Supp. 540, 544 (S.D.N.Y. 1934), modified, 82 F.2d 236 (2d Cir. 1936). For the purposes of Section 60, both secured and unsecured creditors fall into the class of general creditors. The case cited by Petitioner deals with a creditor entitled by law to priority, namely a landlord, who would fall into a different class than a general creditor. Thus it is submitted that Petitioner's position on this issue is clearly erroneous and ought not to furnish grounds for the granting of

certiorari herein.

CONCLUSION

No substantial reasons exist for the granting of certiorari in the instant case. Petitioner has been unable to point to any substantial conflict in the circuits on the issues raised, and indeed no such conflict exists. In summoning authority to challenge the validity of the opinion of the United States Court of Appeals for the Ninth Circuit, Petitioner has repeatedly relied upon authorities which do not support his position, and upon discussions relating to identifiable proceeds, than which nothing could be further from the point here. Finally, Petitioner has fallen far short of any showing that such controversy as does exist as to the interpretation of § 9-306 (4)(d) is

of sufficient importance to warrant this Court's attention. For these reasons, as more fully set forth above, Respondent respectfully urges that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit herein be denied.

RESPECTFULLY SUBMITTED,

LAWRENCE OLLASON
182 North Court Avenue
Tucson, Arizona 85701

LAWRENCE OLLASON

Attorney for Appellant

CERTIFICATE OF SERVICE

I, LAWRENCE OLLASON, do hereby certify that on this the 1 day of ~~February~~ March, 1977, three (3) copies of the Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in final printed form, were mailed, postage prepaid, to:

MR. GEORGE F. RANDOLPH
Attorney at Law
Suite 12, 2920 North 7th Street
Phoenix, Arizona 85014
Attorney for Appellee.

I further certify that all parties required to be served have been served.

LAWRENCE OLLASON

LAWRENCE OLLASON